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RULING ON APPELLEE'S MOTION FOR RECONSIDERATION OF RULING ON RELEASE OF DOCUMENTS AND ORDER

March 24, 2006

Opinion for the Board by Administrative Judge POLLACK.

On June 30, 2005, Judge Anne Westbrook, now retired, issued a ruling in the above-captioned appeal regarding a number of matters, including the claim of deliberative process as to twenty-two (22) documents set out by the Forest Service (FS) on a privilege log. She concluded that the FS had failed to adequately support the designation and ordered production. After her retirement the undersigned took on the appeal. Thereafter, the FS filed a motion dated February 21, 2006, where the FS sought reconsideration of the ruling on those 22 documents, and for imposition of a protective order, as well as for reconsideration regarding several documents from the Council for Environmental Quality (CEQ). The Board rules here on that motion. The Board will not here repeat the extensive history of discovery disputes on this appeal. That was addressed in detail by Judge Westbrook in her ruling. A copy of that Ruling is appended to this Ruling on Reconsideration.

The Appellant has contested the ordered release by Judge Westbrook of the 22 documents. After initial consideration of the motion, the new presiding judge directed the FS to provide the documents for an *in camera* inspection. Such inspection has now been made, along with review of the briefs and review of the declaration of the Chief of the FS explaining and justifying invocation of the deliberative process privilege.

Given the desire to move forward, and the history of discovery in this case, the Board will not here go into a treatise on the law. Rather, the Board directs the parties to the recent decision of Judge Hewitt of the Court of Federal Claims, who in Pacific Gas & Electric Co. v. United States, United States Court of Federal Claims, No. 04-74C (2006) provides an excellent and exhaustive discussion of the case law in the area of deliberative process. The Board is in agreement with Judge Hewitt's understanding of the law. Here the Board will address a few of the legal standards, however, otherwise the Board refers the parties to the Pacific decision for further amplification of the law.

As pointed out by Judge Hewitt, "The deliberative process privilege "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Dep't of Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001). To be deliberative, the material must make recommendations or express opinions on legal or policy matters. Walsky Constr. Co. v. United States, 20 Cl. Ct. 317, 320 (1990). To be deliberative the document must reflect the give and take of the consultative process. Jade Trading LLC v. United States, 65 Fed. Cl. 487, 493 (2005), see also Vons Cos., Inc. v. United States, 51 Fed. Cl. 1, 22 (2001). As set out in Scott Paper Co. v. United States, 943 F. Supp. 489 (E.D. Penn. 1996), "The privilege does not protect factual or investigative material, except as necessary to avoid indirect revelation of the decision making process." Once a document is identified as meeting the above, the party seeking its withholding must state with particularity what information is subject to the privilege. The agency must supply the court with 'precise and certain reasons' for maintaining the confidentiality of the requested document. Walsky, 20 Cl. Ct. at 320. "Blanket assertions of the privilege are insufficient and itself a grounds for denying invocation of the privilege." Vons Cos., Inc., supra. As Judge Hewitt points out, the court stated in Resolution Trust v. Diamond, 773 F. Supp. 597, 604 (S.D.N.Y. 1991) the following:

> [Resolution Trust Corporation (RTC) has failed to meet the requirement that it provide "precise and certain" reasons for its decision to withhold the documents, other than stating a blanket policy of nondisclosure of predecisional, deliberative documents. Indeed, [the head of the agency's] affidavit states:
>
> > The release through discovery of documents protected by the deliberative process privilege would severely harm the RTC's ability to make determinations on controversial issues. If I, or those on whose judgment and input I depend, were to understand that deliberative, decisional documents are to be disclosed, many documents, or at least the view, opinions, recommendations and judgments they contain, would not be created. The

> RTC and the public would be deprived of the free flow of ideas and proposals to its decision makers on which good government depends.
>
> However, this is merely a paraphrase of the rationale for the deliberative-process privilege described in the case law. As such, it is conclusory. Nowhere does Cooke explain why, particularly, the documents in question here are so sensitive that disclosure would compromise the agency decision-making process to such a degree that the public interest in full disclosure is outweighed.

Judge Hewitt at footnote 9 on page (p.) 10 of her decision sets out a series of citations which she states supports the conclusion that the requirement to establish precise and certain reasons, as an independent condition for invoking the deliberative process privilege, is well established in persuasive federal case law. At p. 11 of the opinion, she rejects the premise that a broad assertion of harm is enough, citations omitted. The broad assertion of harm is essentially what the FS has provided as its basis regarding many of the documents at issue in Mountain Valley Lumber (MVL).

Moreover, in Pacific she states that to the extent the Court of Federal Claims has previously said in Yankee Atomic Elec. Co. v United States, 54 Fed. Cl. 306 (2002), that the Government meets the requirement by averring that continued confidentiality is necessary to assure the free flow of ideas and candid discussion within the agency; the decision in Pacific rejects that premise. She points out that significant case authority throughout federal courts has consistently rejected the contention that an explanation that essentially restates the rationale for the deliberative process privilege described in case law is adequate, without an explanation as to why the particular documents being protected are so sensitive that disclosure would compromise the agency decision process. See Resolution Trust, supra.

The Board's review of the documents in issue in this Ruling indicates that most documents for which privilege has been claimed are not in the narrow subcategory of deliberative agency documents but instead are various routine, everyday drafts; minutes of a meeting attended by a large number of representatives of various forests; internal documents unrelated to a specific recommendation; documents that provide direction; and documents that are claimed as privileged solely because they are drafts, but with no further explanation. But for those documents or portions thereof, that the Board has concluded should not be released, the remaining documents here for which the FS claims privilege are not the kind of documents that show any serious harm from disclosure nor relate to high level decisions and deliberations of the type the privilege is intended to protect.

Of particular note is the decision of the Supreme Court in United States v. Nixon, 418 U.S. 683 (1974), cited by Judge Hewitt in her decision. That case involves a matter where the office of the President sought protection. There, the Supreme Court concluded that a broad undifferentiated generalized interest in confidentiality is insufficient to assert the deliberative process privilege. Clearly, if the Court found that the President was required to support the need for protection by more than generalizations in order to invoke privilege, so too, does the Chief of the Forest Service have that obligation.

It has been made clear that the process of protecting a document is not absolute. Rather it is subject to judicial oversight. See Marriot Int'l Resorts, L.P. v. United States, No. 05-5046, 2006 U.S. App. LEXIS 2654 at *15 (Fed. Cir. Feb. 3, 2006). After the government makes a sufficient showing of entitlement to privilege, the court should balance the competing interests of the parties. Scott Paper, supra, 943 F. Supp 496, citing Redland Soccer Club v. Dep't of the Army, 55 F. 3d 827, 854 (3d Cir.1950). In addition, the party seeking disclosure may overcome privilege by a showing of evidentiary need that outweighs the harm that disclosure of the information may cause defendant. Here, the FS has not shown the harm that would occur by release of the documents for which the Board does not find privilege. Accordingly, the threshold which Appellant needs to overcome as to these documents, even otherwise privileged, is not particularly high in this case. The FS has the obligation to provide convincing arguments. It has not approached that standard as to most of the documents in contention, notwithstanding being given more than adequate opportunities to do so.

The Board is in full agreement with Judge Hewitt that the Government carries the burden of adequately describing the reasons for withholding. General contentions such as, "it will chill discussion," are simply not adequate without more. General justifications such as "Future Timidity of Government Employees," are not be sufficient. That being said, the Board in this matter has had the 22 documents to review and has completed that review. Set out below is the Board determination as to each document. The explanation for each is intended to be instructive but not exhaustive. As stated above, the FS has had more than ample opportunity to make its arguments. The Board points out that in virtually every instance, the declaration of Chief Bosworth is conclusory and does not meet the test set in Pacific. The Board also notes that most of the documents are not documents providing a give-and-take. If the Board elected to take the exceedingly broad position taken by the FS as to the privilege of documents, the FS would essentially be withholding everything but final conclusions.

As to establishing the Appellant's need for the documents, a principal contention is whether FS acted responsibly in awarding contracts and the reasonableness of the duration of the delay. Documents relating to what the FS did during the delay and what information it knew before and after the suspension as to the matter of categorical exclusions and other identified issues are within the scope of potential admissible evidence. The privilege is not a vehicle to insulate the FS from having someone know more than simply the final result. The fact that a document is marked as a draft, does not make it automatically subject to the privilege.

The Board has allowed the parties wide leeway in revisiting discovery matters that had been handled by Judge Westbrook. As the undersigned is now responsible for processing the appeal, it was considered prudent to assure that a full vetting of the matters was conducted before reaffirming the order to release documents. The Board does not intend to reconsider further. It has only done so here, because of the late entrance of the undersigned into the processing of the appeal.

Set out below is the Board's determination as to each document, with a brief explanation.

Twenty two (22) documents subject to deliberative process

OGC-1 does not need to be released, but for the paragraphs under Background. The paragraphs to be released are simply a review of the status of matters and do not contain recommendations or reflect deliberative process. The remainder of the document contains recommendations as to possible courses of action as to future timber harvests and thus is properly subject to withholding.

OGC-2 is releasable. It is not deliberative but simply sets out the directions to various Regional Foresters telling them what they are to do as a result of the nationwide injunction being issued. The Board concludes that it was not prepared for purposes of providing recommendations so as to establish a policy. Rather, it sets out the policy to be followed.

OGC-3 is releasable. Again, this is a direction to the recipients telling them what steps to take as a result of the nationwide injunction. It essentially does the same as OGC-2. The attachment which is a summary of the court's order is simply that, a factual summary.

OGC-4 is releasable. This is a slightly reworked version of the attachment to OGC-3. It contains a summary and additionally some direction to the recipients, which are not identified.

FM-5 is not releasable. This transmittal between Mary M. O'Brien, NEPA coordinator and some other person says that it is to "document" some discussions on settlement. It appears that the document was part of a give-and-take process.

EMC-1 is to be released in part only. The title is to be provided. The portion dealing with the recommendations of OGC as to appeal and the rationale are not releasable. The portion which sets out the impacts of not appealing a decision are releasable as the information is factual and not deliberative.

EMC-2 is releasable. It is a transmittal between Mary O'Brien and Ann Bartuska. This appears normal dialogue between officials as to steps being taken regarding CEs. The documents are not deliberative in nature.

EMC-3 is releasable. It is comprised of various notes and the only typed information is "Document : Implementation-alternatives 10-1- 99.aw." The user is identified as mredden. The various hand written cryptic notes do not appear to be deliberative. No adequate explanation to support invoking the privilege has been provided and as such this is releasable.

EMC-4 is releasable in part. It is the same document as OGC-1 and is to be treated accordingly.

EMC-5 is releasable. It sets out the status of the categorical exclusion effort and how that will be dealt with in the FS Handbook. The majority of the document is background which simply repeats what the court did. The last paragraph does contain a mix of fact and opinion, however, on balance, the Board finds the description of the appealability complaint should be released.

RO-1 This document is releasable. It is an Audit Finding from 2001 and has been superceded by RO-2 which for all intents and purposes is the same document. Pages 1-2 and 7-35 are identical and the other pages are essentially the same, with minor variations. The FS has provided no basis to establish harm or to releasing this document nor whether anything in RO-1, as compared to RO-2 needs to be protected.

RO-2 is releasable. It is an Audit Finding and as noted above is essentially the same as RO-1 but this is not marked a draft. The document contains after each review solutions, which are recommendations. Not all recommendations of the government are protected. If that was the case then virtually everything would be in secret.

RO-3 is releasable. It is a chart which identifies projects for which there has been a Lynx audit.

RO-4 is releasable. It is the minutes of a meeting held on January 31 through February 1, 2001. There were well over 30 attendees. This is not deliberative.

SO-1 is releasable. While it is marked as a draft, it contains directions and history. The fact it is addressing a proposed MIS selection process does not make it deliberative and protected.

SO-2 The first six sentences ending with (so not all 41 MIS) are releasable. The remaining portion contains recommendations of a nature to support the deliberative process and seeks input. That portion is not releasable.

SO-3 is releasable. It sets out directions and is factual.

RD-1 is not releasable. It is titled Short Term Strategy for Addressing Management Indicator Species. It is deliberative in that it contains recommendations for future action.

RD-2 is not releasable as it also sets out the Short Term Strategy re: MIS.

RD-3 is releasable. The content is factual and directive and not deliberative. The fact it is marked a draft, without more is not sufficient to cause the document not to be released as deliberative process.

RD-4 is releasable. It is essentially a paragraph identifying RD-5.

RD-5 is releasable. It is the MIS forum minutes. These were widely distributed and not of a deliberative nature.

CEQ Documents.

CEQ 2 is releasable. It advises the recipient of the action, appears to transmit the filing and sets out in summary what is being contended. It does not appear to be confidential.

CEQ 3 is releasable except for the first paragraph of the section titled Related Matters, which includes reference to decisions in other CE cases and various other cases and is the result of attorney work product.

CEQ11 is releasable in part. The Discussion is releasable as it simply lays out the status of the case. The remainder, which includes the Appeal Recommendation is not releasable and is protected.

ORDER

The FS is to provide the documents to Appellant no later than March 31, 2006.

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HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
March 24, 2006